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No. 99-

IN THE

Supreme Court of the United States

YAHYA BICAKSIZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress intended to impose multiple punishments on a single course of conduct that violated different provisions of the same subsection of 18 U.S.C. § 1958.

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Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Dated And Decided October 15, 1999 ..... 1a

Appendix B — Excerpt From Transcript Of The United States District Court For The Eastern District Of New York Dated October 2, 1998 .. 25a

Petitioner, Yahya Bicaksiz, herewith prays for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Second Judicial Circuit to review its judgment order of October 15, 1999, affirming a judgment of conviction and sentence of 215 months imprisonment.

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit affirmed in an opinion dated October 15, 1999. It has not yet been published. A copy of that opinion is reproduced as Appendix A, commencing at 1a.

The opinion of the United States District Court for the Eastern District of New York was delivered from the bench on October 2, 1998. It is unpublished and annexed hereto as Appendix B, commencing at 25a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals of the Second Circuit was entered on October 15, 1999.

This Court has jurisdiction to review, through *certiorari*, the decision of the United States Court of Appeals for the Second Circuit, pursuant to 28 U.S.C. § 1254(1).

Defendant-appellant Yahya Bicaksiz was indicted for two violations of 18 U.S.C. § 1958(a) by a grand jury sitting in the Eastern District of New York. The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

The matter was tried by a jury in the Eastern District of New York. Mr. Bicaksiz was found guilty on May 26, 1998,

and sentenced on October 2, 1998. The conviction was entered on October 2, 1998.

A Notice of Appeal was timely filed on October 6, 1998, and amended on October 13, 1998.

Appellate review by the United States Court of Appeals for the Second Circuit is appropriate under Federal Rule of Appellate Procedure (F.R.A.P.) 4(b).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> No person shall be . . . subject for the same offense to be twice out in jeopardy of life or limb. . . .

STATEMENT OF THE CASE

This is a criminal case. The defendant, Yahya Bicaksiz, was arrested on February 20, 1998 on a criminal complaint, and was indicted for a substantive violation of 18 U.S.C. § 1958(a) and for conspiracy to violate said provision, on February 20, 1998. He was tried by a jury before the Hon. Nina Gershon, and found guilty on May 26, 1998. He was sentenced to a term of imprisonment of two hundred fifteen (215) months — one hundred twenty (120) months for conspiracy to commit murder and ninety-five (95) months on the substantive count of murder for hire.

He is currently serving his term of incarceration.

At the time of his arrest, Yahya Bicaksiz was a 61-year-old businessman with no prior criminal history. He came to the United States as a Turkish immigrant, became a citizen, worked hard, and eventually became the owner of a meat market in Nazareth, Pennsylvania and a Turkish restaurant in Union City, New Jersey. He resided in Pennsylvania.

On February 20, 1998, Mr. Bicaksiz was indicted on one count of conspiracy to travel in interstate commerce with the intention that a murder-for-hire be committed, and one count of traveling in interstate commerce with the intention that a murder be committed. The government alleged that Mr. Bicaksiz, who was going through a difficult divorce, had decided to murder his brother-in-law, one Osman Esen. The government posited various motives for the intended murder, including Mr. Bicaksiz's alleged desire to intimidate his wife into accepting a property settlement, and to punish his brother-in-law for siding with Mrs. Bicaksiz in the divorce.

The government alleged that Mr. Bicaksiz had requested his employee, one Zaour Kapaev, known as "Khazim," to arrange the details of the killing. Kapaev, who was tried jointly with Mr. Bicaksiz, enlisted the help of one Magomed Sadoulaev to find a killer. Mr. Sadoulaev, who became a government witness, then recruited one David Vayzer to do the killing. Vayzer backed out of the job, but recruited one Sergey Krutikov to take his place. Before Krutikov even obtained a weapon, however, Vayzer had a further attack of conscience and went to the authorities. Acting as a cooperating witness, Vayzer then taped a conversation with Sadoulaev, who was arrested. Sadoulaev, in turn, agreed to tape Mr. Bicaksiz. Ultimately, Messrs. Bicaksiz, Kapaev, and Krutikov were arrested and tried jointly.

Sadoulaev testified that Kapaev, telephoned him in January of 1998 and suggested that they meet. A few days later he met with Kapaev and Yahya Bicaksiz in Brooklyn around 8:30 p.m. Mr. Bicaksiz had driven into New York from Pennsylvania. Mr. Bicaksiz told Sadoulaev that he wanted to kill his brother-in-law and was willing to pay money to have this done.

Sadoulaev then enlisted a friend of his, David Vayzer, to do the killing. Sadoulaev then telephoned Kapaev and arranged a meeting with Mr. Bicaksiz in Paterson, New Jersey. The three met at a restaurant. Mr. Bicaksiz offered to pay $10,000 for the killing.

Sadoulaev then went back to Vayzer and communicated this exchange. Vayzer requested more money; he sought $15,000 with a $5,000 deposit. Vayzer also requested a photo and address of the intended victim. Sadoulaev spoke to Kapaev, who promised to pass Vayzer's requests to Mr. Bicaksiz.

Vayzer then had a change of heart about his personal involvement. He contacted an acquaintance, Sergey Krutikov, and enlisted him to do the killing.

The two then drove to Paterson, New Jersey to pick up the money, photograph, and address. Vayzer discharged Kruitkov and instructed him to wait, while he met with Sadoulaev and received the requested items. Vayzer was also given $5,000 in one hundred dollar bills. He returned to the car and told Krutikov that he had only been given $3,000.

Krutikov drove Vayzer to his apartment in Brooklyn. They arranged for Vayzer to find out about the remaining

money and then get in touch with Krutikov. Vayzer paid Krutikov $100 for the ride to Paterson and was dropped off around 11:00 p.m.

Shortly thereafter, on February 11, 1998, Vayzer approached a police car near his apartment on West 6th Street in Brooklyn and informed an officer that he had information about an intended murder. He showed the officer $4,900 in cash, a piece of paper, and a photograph. The officer accompanied him to the 62nd precinct where he spoke with a detective. Vayzer remained at the precinct all night until the arrival of FBI agents the next morning. When the FBI agents arrived, he gave them an account of a murder-for-hire plan. Vayzer then agreed to record conversations with the involved individuals. No charges were ever brought against Vayzer.

Sadoulaev then met with Vayzer at a diner on West 12th Street in Brooklyn. Vayzer was wearing a wire and taped the meeting. Several days later, Sadoulaev and Vayzer met for a second time. After taping that meeting, the FBI arrested Sadoulaev. He began cooperating.

On February 17, 1998, Sadoulaev made two telephone calls to Mr. Bicaksiz from the FBI office in New York. In the first call, Sadoulaev, in English, told Mr. Bicaksiz that he needed another photograph because "he" lost the photograph. Mr. Bicaksiz replied, in broken, nearly unintelligible English. In the second call, Sadoulaev again pushed for a photograph and also, for additional funds. Mr. Bicaksiz, again in broken English, was non-committal.

On February 20, 1998, Mr. Bicaksiz was arrested.

Following the verdict of guilty, Mr. Bicaksiz dismissed his prior counsel and retained new counsel.

On September 21, 1998, new counsel filed his objections to the Pre-Sentence Investigation Report (PSIR), noting that for sentencing purposes, the two counts of conviction merge, making the maximum sentence of imprisonment ten years.

Subsequently, the defense and the government conducted a furious fax campaign back and forth to the district court. The government argued that each offense of conviction was a distinct offense for which multiple punishments could be imposed. The defense argued that Congress never intended to impose multiple punishments for a single course of conduct that happened to violate different clauses of the same subsection of 18 U.S.C. § 1958.

On October 2, 1998, after a bitterly contested sentencing hearing, the trial court held that consecutive sentences were authorized by 18 U.S.C. § 3584(a). Mr. Bicaksiz was sentenced to a total term of 215 months, 120 months on count one and 95 months on count two.

This appeal followed.

REASONS FOR GRANTING THE WRIT

I.

WHETHER CONGRESS INTENDED TO IMPOSE MULTIPLE PUNISHMENTS FOR VIOLATION OF A SINGLE COURSE OF CONDUCT THAT VIOLATED DIFFERENT PROVISIONS OF THE SAME SUBSECTION OF 18 U.S.C. § 1958 IS AN UNSETTLED ISSUE AND *SUI GENERIS* BEFORE THIS COURT. IN PERMITTING CONSECUTIVE PUNISHMENTS, THE SECOND CIRCUIT DISREGARDED THE RULE OF LENITY.

Mr. Bicaksiz was convicted of traveling interstate with the intent to hire someone to commit murder, and conspiracy to commit murder-for-hire. The prosecution argued that the substantive offense was committed when Mr. Bicaksiz traveled from Pennsylvania to Brooklyn to ask Sadoulaev to commit murder, and that the conspiracy was committed when Sadoulaev said "yes." In imposing consecutive punishments, the trial court held that every violation of each prohibition listed in Section 1958(a) is a separate crime, for which multiple punishments may be imposed.

The issue of whether Congress intended to permit multiple punishments for murder conspiracies that involve both planned and actual travel across state lines was *sui generis* before the Second Circuit. Prior to its ruling, no court has taken up the question of whether the government can pyramid sentences by making the separate clauses of Section 1958 into separate crimes that permit separate punishment.

Section 1958 of Title 18 contains a single subsection, subsection (a), that enumerates in the alternative various ways in which the statute can be violated:

> Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce, with the intent that a murder be committed . . . as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both. . . .

18 U.S.C. § 1958(a) (1996).

A similar question has arisen with respect to Section 922(g) of Title 18, which criminalizes firearm possession by categories of persons specified in nine numbered subdivisions. Among those who may not possess firearms are felons, fugitives, drug addicts, the mentally ill, and aliens. 18 U.S.C. §§ 922(g)(1), (2), (3), (4) and (5). The enumeration of so many different categories of persons tempted prosecutors to attempt to double sentences upon those defendants unlucky enough to fall into more than one prohibited category. In a thoughtful series of decisions commencing with *United States v. Winchester*, 916 F.2d 601 (11th Cir. 1990), the Courts of Appeals for the Eleventh, Fifth, Tenth, and Fourth Circuits have all prohibited such multiple punishment. That analogous body of case law yields a number of principles that suggest the outcome here.

In *Winchester*, the defendant received consecutive sentences for being both a felon and a fugitive in possession of a firearm. 18 U.S.C. §§ 922(2)(1) and (2). The Eleventh Circuit noted that Section 922(g) did "not expressly indicate whether Congress intended to permit consecutive sentencing for the same incident under two subdivisions of section 922(g)." *Id.* at 606.

In *Winchester*, as here, the government argued that multiple punishments were clearly authorized by *Blockburger v. United States*, 284 U.S. 299 (1932), as each subdivision required proof of a fact that the other did not. The *Winchester* court held that *Blockburger* had no application when a defendant is sentenced under two subdivisions of the same section of the governing statute. *Blockburger*, by its own terms, applies to different statutes. *Id.* at 606.[1] The real question, whether Congress had intended to permit multiple punishments, could not be resolved by reference to *Blockburger*. *See also Sanabria v. United States*, 437 U.S. 54, 70 n.24, 98 S. Ct. 2170, 2182 n.24 (1978) (The *Blockburger* test is "used to determine whether a single transaction may give rise to separate prosecutions, convictions, and/or punishments under *separate* statutes") (emphasis added).

In attempting to determine Congressional intent, the *Winchester* court emphasized the fact that Congress had provided penalties for the violation of 922(g), "but it did not list separate penalties for the separate subdivisions of subsection(g)." *Id.* at 605. Further, the purpose of the law

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1. The *Winchester* court noted that Blockburger himself was sentenced under sections 1 and 2 of the Harrison Narcotics Act. (*See Blockburger*, 284 U.S. at 303, 52 S. Ct. at 181.)

was to keep firearms out of the hands of persons Congress considered to be potentially dangerous and irresponsible; there was no indication that punishment was to be multiplied by the number of different statuses the defendant held. *Id.* at 606. And the legislative history was silent on consecutive sentences. *Id.* at 607. Thus, when Congress enacted Section 922(g), it was not "within Congress' comprehension or intention that a person could be sentenced, for a single incident, under more than one of the subdivisions of section 922(g)." *Id.* at 606.

The *Winchester* court also decried the "anomalous and draconian result" that could occur when a firearm was possessed by a man who happened to be a fugitive, mentally-defective, drug-addicted alien felon. Such a person could receive five separate and consecutive sentences for the same gun. *Id.* at 607.

Because there was no evidence of Congressional intent to multiply punishments, the *Winchester* court applied the rule of lenity, insuring that courts "will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Simpson v. United States*, 435 U.S. 6, 15, 98 S. Ct. 909 (1978).

The *Winchester* court discussed lenity at length:

> Lenity, the quality of being lenient or merciful, is an application of the common law principle that criminal statutes are to be strictly construed, a rule which "is perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat) 35, 43, 5 L.Ed. 37 (1820). The

> rule "rests on the fear that expansive judicial interpretations will create penalties not originally intended by the legislature." 3 N. Singer, Sutherland Statutory Construction, § 59.03 (4th ed. 1986). It is "an outgrowth of our reluctance to increase or multiply punishments absent a clear and definite legislative directive." *Simpson* [*v. United States*], 435 U.S. [6], at 15-16, 98 S.Ct. [909] at 914 [1978].

916 F.2d at 607.

Following *Winchester*, the Fifth Circuit faced the same question in a case where an illegal alien and convicted felon had been sentenced to consecutive sentences for possession of the same firearm. In *United States v. Munoz-Romo (Munoz-Romo I)*, 947 F.2d 170 (5th Cir. 1991), the Fifth Circuit held that double punishments were authorized, applying the *Blockburger* test. *Id.* at 176. The defendant sought *certiorari*. In response to the petition, the Solicitor General confessed error and urged that one of the two counts be dismissed. The Supreme Court granted *certiorari*, and vacated the judgment "for further consideration in light of the position asserted by the Solicitor General. . . ." 506 U.S. 802, 113 S. Ct. 30 (1992).

On remand, the Fifth Circuit adopted the position of the *Winchester* court. *United States v. Munoz-Romo (Munoz-Romo II)*, 989 F.2d 757 (5th Cir. 1993). The Fifth Circuit also noted that Section 922(g) did not create "a case like *Blockburger*, where Congress criminalized different actions, in different statutes, at different times." *Id.* at 759. The *Munoz-Romo II* court emphasized that Congress had made changes to Section 922(g), adding to the list of offenders, "but has not changed the section's structure." Hence:

> Congress, by rooting all the offenses in a single legislative enactment and including all the offenses in subsections of the same statute, signaled that it did not intend multiple punishments for the possession of a single weapon.

Id. at 759.

The Tenth Circuit, in *United States v. Johnson*, 130 F.3d 1420 (10th Cir. 1997), *cert. denied*, __ U.S. __, 119 S. Ct. 78 (1999) and the Fourth Circuit, in *United States v. Dunford*, 148 F.3d 385 (4th Cir. 1998) came to the same conclusion.[2]

Applying the wisdom of the *Winchester* line of cases to Section 1958 makes it clear that multiple punishments may not be imposed. First and foremost, there is no express indication that Congress intended to authorize separate punishments for conduct that violated more than one clause in Section 1958. As with Section 922(g), there is no listing of separate penalties for separate subsections. Indeed, the drafters of Section 1958 did not even include separate numbered subdivisions; the entire subsection is held together by commas, the use of the alternative ("or"), and semicolons. In the language of *Munoz-Romo II*, Congress "rooted" all of the offenses together in a single enactment and included all of the offenses as subsections — signaling that it did not intend to impose multiple punishments.

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2. In *United States v. Peterson*, 867 F.2d 1110, 1115 (8th Cir. 1989), *abrogated on other grounds*, *Horton v. California*, 496 U.S. 128 (1990), the Eighth Circuit, in conclusory fashion, held that separate convictions could be maintained for separate violations of subdivision of 922(g). The *Peterson* ruling, predating the Solicitor General's position, has not been reaffirmed in the Eighth Circuit.

As with Section 922(g), Section 1958 has been amended several times, without any change to its basic structure. The present Section 1958 began as P.L. 98-473, originally codified at Section 1952(A). 98 Stat. 2136. Section 1952(A) *did not* contain the "or who conspires to do so" language, or any other conspiracy provision. That language was added in 1994, by P.L. 103-322 § 140007, which increased penalties for all travel act crimes that involved actual violence, and added the words "or who conspires to do so" before the language "shall be fined." 108 Stat. 2033. Had Congress intended to authorize multiple punishments for the conspiracy and its object, it could have easily done so by creating a separate subsection with a separate punishment. Congress had the benefit of *Winchester*, *Munoz-Romo I* and *Munoz-Romo II*, and the Solicitor General's opinion. Instead, Congress deliberately inserted "or who conspires to do so" as an additional clause in the existent structure of Section 1958.[3]

The same "anomalous and draconian" result condemned in the *Winchester* line of cases occurred in this case. Mr. Bicaksiz's sentence was virtually doubled for engaging in

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3. Congress actually passed the same amendment to Section 1958 twice in 1994. In both P.L. 103-322, § 140007, and P.L. 103-322, § 320103, Congress twice added the "or who conspires to do so" language to Section 1958, in precisely the same place. 108 Stat. 2111. It was unclear what excess of zeal caused Congress to pass two laws that said exactly the same thing, but neither of them changed the structure of the statute or demonstrated any intent to punish separately the conspiracy and its object. On October 11, 1996, Congress enacted P.L. 104-294, § 601(g), aptly entitled, "Corrections Of Problems Arising From Uncoordinated Amendments," omitting one of the phrases "or who conspires to do so." P.L. 104-294, § 601(g)(3), 110 Stat. 3500.

travel that was, at best, incidental to the conspiracy. The court below found nothing amiss in assessing a ten-year penalty upon Mr. Bicaksiz for traveling from Pennsylvania to Brooklyn for the purpose of asking Mr. Sadoulaev to find a hit man, then imposing an additional ten-year penalty because Mr. Sadoulaev said "yes."

Taking this one step further, one can imagine a hapless hit man who travels from Canada through New York to New Jersey. He sends his intended Canadian victim a letter, who replies to the New Jersey address. The intended victim then drives down from Canada, through New York, into New Jersey. The defendant is then arrested. Under the trial court's anomalous and draconian view, the defendant has not committed one violation of Section 1958; he has committed eight.

The legislative history of P.L. 98-473 shows that Congress' purpose was to expand federal jurisdiction in murder-for-hire cases, particularly those that had an organized crime component. Congress was concerned that local law enforcement did not always have the resources to prosecute such cases. The then-existing law did not impose federal criminal liability for contract murders unless there was a drug, bribery, or gambling component. Senate Report No. 225, at 304-306. The prohibited acts described in Section 1958 are little more than jurisdictional hooks to permit the federal government to snare certain cases in which there is a federal (as opposed to purely local) interest.

There is no Senate Report for P.L. 103-322, § 140007. The conspiracy section appears to have been added as a result of the original drafters' oversight. It clearly comports with the overall statutory purpose of providing the federal

authorities the option of entering almost any murder-for-hire case. Certainly there is no evidence that Congress believed murder conspiracies were a separate and distinct problem warranting a separate and distinct law and punishment. To the contrary, Congress appeared to have recognized that most murders-for-hire would simultaneously involve conspiracies and substantive acts that would pull one of the jurisdictional triggers.

The Second Circuit rejected this analysis, relying on this Court's decision in *Callanan v. United States*, 364 U.S. 567 (1961), citing it for the proposition that Congress always intends multiple punishments for both a conspiracy and the underlying substantive offense, unless Congress makes a clear statement to the contrary. In *Callanan*, this Court upheld multiple punishments for a substantive Hobbs Act violation, as well as for conspiracy to violate the Hobbs Act. The Hobbs Act, codified at 18 U.S.C. § 1951 provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned nor more than twenty years, or both.

18 U.S.C. § 1951. On its face, the codified version of Section 1951 appears to be identical in structure to the enacted version of 18 U.S.C. § 1958, grouping all of the offenses into the same section of a single enactment.

The codified version of the Hobbs Act, however, fundamentally changed the structure of the Hobbs Act that was actually enacted by Congress.

The pertinent part of the Hobbs Act Amendments of 1946, 60 Stat. 420, from which the 1948 codification was compiled, were as follows:

> § 2. Whoever in any way obstructs, delays, or affects commerce, or the movement of commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.
>
> § 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.

Callanan, 364 U.S. at 588 n.1.

Thus, when Congress passed the Hobbs Act, it clearly signalled its intention to authorize multiple punishments by placing conspiracy in a separate section than the substantive offenses. *See United States v. Munoz-Romo (Munoz-Romo II)*, 989 F.2d 757 (5th Cir. 1993).

Congress did not follow a similar path with Section 1958. When Congress added "or who conspires to do so" to Section 1958, it did not do so by creating a separate section. 108 Stat. 2111. Rather, it simply inserted the conspiracy language as an additional clause, one of many different clauses, defining different ways in which the law could be violated. By amending Section 1958, but not changing its

basic structure, Congress signalled that it did not intend multiple punishments for violations of different clauses describing offense conduct. *Munoz-Romo II*, 989 F.2d at 759.

This basic difference in structure between the enacted version of 18 U.S.C. § 1951 and the enacted version of 18 U.S.C. § 1958 also answers the hypothetical issue raised *supra*:

> A hit man travels from Canada through New York to New Jersey. He sends his intended Canadian victim a letter, who replies to the New Jersey address. The intended victim then drives from Canada, into New York, and then into New Jersey.

Under the government's view of Section 1958, the hit man has committed eight separate crimes, for which eight consecutive ten-year sentences are authorized. Applying the government's logic to its erroneous construction of the Hobbs Act, a person who obstructs *and* delays *and* affects the movement of an article in commerce by extortion has committed three Hobbs Act violations, each carrying a separate penalty. Both results, of course, are absurd. Moreover, both results are foreclosed by the structure of the respective statutes.

Section 2 of the Hobbs Act Amendments of 1946 groups "obstruct," "delay" and "affect" into a single section of a single enactment, thereby clearly demonstrating Congressional intent to punish only once. The conspiracy provision, however, is set off in a different section, demonstrating a desire to cumulate punishments for conspiracy and the substantive offense.

Section 1958, by contrast, groups all of the offense conduct together into a single section, including the conspiracy provision. One who travels both interstate and internationally for the purpose of effecting a murder-for-hire is subject to only one punishment, even though crossing an international border is a different act than crossing an interstate border. Similarly, one who conspires to travel interstate for the purpose of committing a murder-for-hire, then crosses the state border for the same purpose, has committed one crime for which one punishment may be imposed.

There is no doubt that Congress could pass a statute that cumulated punishments for the conspiracy and substantive offense of interstate travel to commit murder for hire. Similarly, Congress could pass a statute that cumulated punishments for both interstate and international travel for the purpose of committing murder for hire. The Hobbs Act Amendments of 1946 provide a template for doing so. Congress simply did not enact such a law when it enacted 18 U.S.C. § 1958. At the very least, Congressional intent is sufficiently murky that the rule of lenity must be applied.

It may well be, as the Second Circuit held, that "the sentence and paragraph structure of a statutory amendment is not a Rosetta Stone of statutory construction . . . ." Appendix A, at 13a. However, such a structure remains a useful and important tool to ascertain Congressional intent. *Winchester*, 916 F.2d at 605. It is arguably more useful and realistic to begin with what Congress actually did than to assume, as did the Second Circuit, that the Congressional draftspersons of 1994 were dutifully cognizant of *Callanan* and their creation of a single subsection of violations was done with the conscious intent to have some violations of

one subordinate clause permit multiple punishments while violations of other subordinate clauses permit only single punishments. This is especially true when the Legislative history demonstrates that Congress and its drafters were so unaware and inattentive that they actually drafted and passed the same piece of identical legislation twice — then had to go back and pass new legislation to repeal one of the redundancies. The amount of deep, trenchant, jurisprudential scholarship that should be imputed to Congress in this area is questionable.

The Second Circuit began with the premise that because Congress could authorize consecutive punishments for a conspiracy and a substantive offense, the Second Circuit would find that Congress did so authorize, absent a clear expression to the contrary. Such reasoning precisely inverts the rule of lenity, and transforms it into a rule of harshness.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED OCTOBER 15, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1998
(Argued: May 5, 1999 Decided: October 15, 1999)
Docket Nos. 98-1576, 98-1592

UNITED STATES OF AMERICA,

Appellee,

— v. —

YAHYA BICAKSIZ and SERGEY KRUTIKOV,

Defendants-Appellants,

ZAOUR KAPAEV and MAGOMED SADOULAEV,

Defendants.

Before:

CABRANES and SACK, *Circuit Judges*,
and SHADUR, *District Judge*.*

* * *

* The Honorable Milton I. Shadur, of the United States District Court for the Northern District of Illinois, sitting by designation.

Appendix A

JOSÉ A. CABRANES, Circuit Judge:

Yahya Bicaksiz and Sergey Krutikov appeal from judgments of conviction entered in October 1998 by the United States District Court for the Eastern District of New York (Nina Gershon, *Judge*), after a jury trial, convicting each of them, of one count of conspiracy to travel in interstate commerce with intent to commit a murder for hire (Count I of the indictment) and convicting Bicaksiz alone of the substantive offense of traveling in interstate commerce with intent to commit a murder for hire (Count II), all in violation of 18 U.S.C. § 1958.

Bicaksiz challenges his judgment of conviction on three grounds. First, he contends that Congress did not intend to allow separate sentences for conspiracy and a substantive offense under 18 U.S.C. § 1958. Second, he contends that the District Court erred in admitting into evidence the testimony of his wife that he had threatened to kill her. Finally, he argues that it was error for the District Court to deny his motion for a downward departure for ineffective assistance of counsel and to decline his request to hold an evidentiary hearing on this motion. Krutikov's sole claim on appeal is that the evidence of his involvement in the conspiracy was insufficient to convict him. For the reasons set forth below, we affirm the judgments in all respects.

I.

The following is an account of the evidence presented at trial, which we are required to view in the light most favorable to the government. *See Glasser v. United States*,

315 U.S. 60, 80 (1942); *United States v. Frank*, 156 F.3d 332, 334 (2d Cir. 1998). Most of the events relating to the murder scheme took place in January or February 1998.

In November 1997, Yahya Bicaksiz ("Bicaksiz") separated from his wife of almost ten years, Bedriye Bicaksiz ("Bedriye"). The separation followed the couple's meeting in October 1997 with a lawyer. Bedriye testified at trial that, at about that time, Bicaksiz told her "if you touch my businesses I will die," and she replied "I'm not touching your businesses." Among Bicaksiz's businesses were a "halal"[1] meat market in Pennsylvania and a Turkish restaurant in Union City, New Jersey. On one occasion later in October, Bicaksiz yelled at Bedriye that he hated her brother, Osman Esen, and that she and her brother came from a "very free liberal family." On December 5, 1997, Bedriye changed her mind about the divorce settlement and told the couple's lawyer that "whatever he has I want half of it."

In January 1998, Zaour Kapaev, an employee at Bicaksiz's halal meat market in Pennsylvania, telephoned Magomed Sadoulaev at Bicaksiz's behest to arrange a meeting with Bicaksiz. Sadoulaev had become acquainted with Bicaksiz and Kapaev during previous visits to Bicaksiz's meat market.

A few days after the phone call, Kapaev and Bicaksiz drove to the Brighton Beach neighborhood of Brooklyn, New York, to meet with Sadoulaev. At that meeting, Bicaksiz told

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1. "Halal" foods are those prepared in accordance with Islamic religious law.

Sadoulaev that he wanted to kill Osman Esen and that he had contacted Sadoulaev in the hope that he knew someone who would be willing to carry out the murder in exchange for money. Sadoulaev agreed to inquire about a hitman.

Shortly thereafter, Sadoulaev contacted David Vayzer, whom he had met about two and a half years earlier while doing maintenance work at the building in Brighton Beach where Vayzer lived. When Sadoulaev later visited Vayzer at his home, he inquired about a friend of Vayzer's, one Sergey Krutikov, who also had lived in Vayzer's building. In response, Vayzer told Sadoulaev (untruthfully) that he had not seen Krutikov for a long time. Sadoulaev then turned to the subject of the murder-for-hire plot and asked Vayzer if he knew anyone who could carry it out. Vayzer offered to do it himself because, he said, he needed the money; he told Sadoulaev that he had a gun and that he did not want to involve anyone else. Sadoulaev did not refer to Bicaksiz or Kapaev by name, nor did he ever reveal their identities to Vayzer. Similarly, it appears from the record that Bicaksiz and Kapaev were never informed of Vayzer's identity.

On being told that he would be paid $10,000 for the murder, Vayzer said he would need $15,000, with $5,000 paid in advance, and a photograph and the address of Esen, the intended victim. Sadoulaev asked Kapaev to call Bicaksiz, who agreed to Vayzer's terms. Sadoulaev then told Vayzer to meet him in Paterson, New Jersey the following evening. Because Bicaksiz and Kapaev had informed Sadoulaev that they did not wish to meet the hitman and Vayzer, in turn, had told Sadoulaev that he did not wish to meet the person paying for the murder, Sadoulaev arranged

to meet alone with Bicaksiz and Kapaev before meeting with Vayzer at another nearby location

Before meeting with Sadoulaev, Vayzer had second thoughts about committing the murder and expressed his concerns to his friend Krutikov, the man about whom Sadoulaev had inquired when Vayzer was first contacted. According to Vayzer's testimony, Krutikov told Vayzer that he (Krutikov) would be willing to commit the murder and that "everything was bad in his life and he didn't want to live." Krutikov, who was a livery car driver, drove Vayzer to Paterson for the meeting with Sadoulaev.

In Paterson, Sadoulaev first met with Bicaksiz and Kapaev to collect the $5,000 advance and Esen's photograph and address. He later met with Vayzer alone to relay these items. Vayzer spoke with Sadoulaev on the telephone. Prior to their meeting, Vayzer told Sadoulaev (falsely) that he (Vayzer) was alone; the record of the trial does not suggest that Vayzer ever mentioned Krutikov to Sadoulaev or even hinted at any time that he (Vayzer) had recruited another person to join the conspiracy.

After leaving Sadoulaev, Vayzer momentarily took shelter in a restaurant, separated $3,000 from the money he had been given, and rejoined Krutikov, telling him that he had received only $3,000 and did not expect to get the entire sum before the murder went forward. On arriving back in Brooklyn, Vayzer paid Krutikov a livery service fee of $100 for driving him to New Jersey. He then went to the police. In cooperation with the police and the FBI, Vayzer recorded conversations he had with Sadoulaev on February 12, 1998,

and with Krutikov four days later. In the latter conversation, Krutikov reiterated his interest in committing the murder but stated that he did not want to meet with Sadoulaev. Krutikov apparently knew that Sadoulaev was the intermediary with whom Vayzer had been negotiating, because in the course of police-recorded conversations with Vayzer, Krutikov referred several times to "Maga," Sadoulaev's nickname.

Krutikov and Sadoulaev were arrested on February 16, 1998, and Sadoulaev agreed to cooperate. The next day Sadoulaev recorded conversations with Bicaksiz and Kapaev, who were subsequently arrested.

In a two-count indictment filed February 26, 1998, a grand jury charged Bicaksiz, Kapaev, Sadoulaev, and Krutikov with one count of traveling in interstate commerce "with intent that a murder be committed" in exchange for money, in violation of 18 U.S.C. § 1958, and one count of conspiracy to travel in interstate commerce "with intent that a murder be committed" in exchange for money, also in violation of 18 U.S.C. § 1958.

Sadoulaev pled guilty to both counts, but Bicaksiz, Kapaev, and Krutikov were tried by a jury before Judge Gershon. Bicaksiz and Kapaev were convicted on both counts, and Krutikov was convicted on the conspiracy count only.

Judge Gershon sentenced Bicaksiz (the only defendant appealing on a sentencing issue) principally to a total term of imprisonment of 215 months — 120 months on the conspiracy count, and (consecutively) 95 months on the

substantive count. She sentenced Krutikov principally to imprisonment for 100 months. After sentencing, Bicaksiz and Krutikov brought this appeal. Kapaev has filed a notice of appeal, but his appeal is pending before another panel of this Court.

II.

A. Bicaksiz's "Consecutive Sentences"[2]

Bicaksiz first argues on appeal that the District Court erred in imposing "consecutive sentences" for his conspiracy and substantive offense convictions under 18 U.S.C. § 1958[3]

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2. Although Bicaksiz refers to "consecutive sentences," the argument on appeal refers to the imposition of separate sentences for the substantive crime and the conspiracy to commit the substantive crime. During sentencing, counsel for Bicaksiz conceded that, if the multiple sentences were valid, "the guidelines [would] permit the imposition of an aggregate sentence in consecutive fashion."

3. Section 1958 reads, in pertinent part, as follows:

> Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, . . . with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both[.]

18 U.S.C. § 1958(a).

— that is, in imposing separate sentences for each of the charged offenses.

Bicaksiz relies principally on cases from other circuits holding that a defendant may not receive multiple sentences for violating multiple subsections of another statute, 18 U.S.C. § 922(g). *See, e.g., United States v. Munoz-Romo*, 989 F.2d 757 (5th Cir. 1993); *United States v. Winchester*, 916 F.2d 601 (11th Cir. 1990). Section 922(g) prohibits the shipment or receipt of a firearm or ammunition by certain types of individuals — such as convicted felons and drug addicts — enumerated in the statute's subsections.[4] In

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4. At the time these cases were decided, 18 U.S.C. § 922(g) read as follows:

> It shall be unlawful for any person —
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> > (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
> >
> > (2) who is a fugitive from justice;
> >
> > (3) who is an unlawful user of or addicted to any controlled substance . . . ;
> >
> > (4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
> >
> > (5) who, being an alien, is illegally or unlawfully in the United States;

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Winchester, the Court of Appeals for the Eleventh Circuit held that "Congress did not intend to provide for the punishment of a defendant under two or more separate subdivisions of 18 U.S.C. § 922(g)." *Winchester*, 916 F.2d at 607. The *Winchester* Court reasoned that § 922(g) was meant to be used to keep guns out of the hands of certain categories of persons, not to punish individuals for having a particular status, such as that of convicted felon, drug addict, or "illegal alien." The *Winchester* Court also noted that a contrary interpretation would allow a defendant who is a convicted felon and is also a fugitive from justice, a drug addict, a "mental defective," and an "illegal alien," to be sentenced to five separate terms for the same incident. *Id.* at 607.

These § 922(g) cases, however, are inapposite. The multiple convictions of Bicaksiz are attributable not to his

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> (6) who has been discharged from the Armed Forces under dishonorable conditions; or
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> (7) who, having been a citizen of the United States, has renounced his citizenship;
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> to ship or transport in interstate or foreign commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g) (1988). Since that time, the statute has been amended, *inter alia*, to add to the list stalkers and those convicted of a misdemeanor crime of domestic violence.

multiple characteristics or statuses but, instead, to the fact that he both committed a substantive offense and engaged in a conspiracy to commit that offense. The Supreme Court has long held that these are separate and distinct offenses that permissibly may result in the imposition of cumulative sentences. *See Callanan v. United States*, 364 U.S. 587, 593 (1961). The *Callanan* Court explained:

> This settled principle derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement — partnership in crime — presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish.

Id.; *see also United States v. Ramirez-Amaya*, 812 F.2d 813, 817 (2d Cir. 1987) ("[C]onspiracies have traditionally been viewed as offenses that cause kinds of harm that are distinguishable from the harm caused by the underlying substantive offenses."). Moreover, the *Callanan* Court held that Congress had exercised its clear prerogative to authorize separate, potentially cumulative sentences for conspiracy and substantive offenses when it amended the statute at issue

there, 18 U.S.C. § 1951, which is similar in structure to § 1958. *Id.* at 594-595.[5]

Seeking to distinguish § 1958 from § 1951, Bicaksiz claims that the pre-enactment structure of the Hobbs Act Amendments of 1946 (which amended § 1951) demonstrates that Congress in that instance intended conspiracy and substantive offenses to be punished separately.[6] Specifically,

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5. At the time *Callanan* was decided, the pertinent part of § 1951 read as follows:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a) (as reproduced in *Callanan*, 364 U.S. at 588 n.1).

6. The relevant portions of the Hobbs Act Amendments of 1946, 60 Stat. 420, from which the codification in § 1951 was compiled, are reproduced in *Callanan*, 364 U.S. at 588 n.1, as follows:

> Sec. 2. Whoever in any way or degree obstructs, delays or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.

(Cont'd)

he contends that the separation of the conspiracy and substantive provisions of the Hobbs Act Amendments into distinct paragraphs indicates a legislative intention to provide for separate — and, thus, possibly cumulative — punishments. He argues that § 1958, in contrast, was not enacted in this form and, therefore, that the teaching of *Callanan* is simply not applicable to § 1958.

The argument is not persuasive. In holding that § 1951 imposed separate, potentially cumulative punishments for conspiracy and substantive offenses, the Supreme Court in *Callanan* did not rely on the structure of the Hobbs Act

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> Sec. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.
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> Sec. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.
>
> . . .
>
> Sec. 6 Whoever violates any section of this title shall, upon conviction thereof, be punished by imprisonment for not more than twenty years or by a fine or not more than $10,000, or both.

Id. According to *Callanan*, "[t]he Reviser's Note to the 1948 Code states that 'The words "attempts or conspires so to do" were substituted for sections 3 and 4 of the 1946 act.' " *Id.*

Amendments.[7] Instead, the *Callanan* Court reasoned that when Congress passed the Amendments, it was "not . . . unfamiliar with the commonplaces of our law," 364 U.S. at 594, including the principle that a substantive offense and conspiracy are separate convictions for which separate punishments may be imposed. Furthermore, the Court noted that Congress had passed the Hobbs Act Amendments after *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), in which the Court had affirmed separate, cumulative sentences for conspiracy to monopolize and monopolization, both of which were made criminal by § 2 of the Sherman Act. *See Callanan*, 364 U.S. at 594-95. The Court concluded: "To dislodge such conventional consequences in the outlawing of two disparate offenses, conspiracy and substantive conduct, and effectuate a reversal of the settled interpretation we pronounced in *American Tobacco*[,] would require specific language to the contrary." *Id.* at 595.

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7. The Court's non-reliance on the structure of the amendments is hardly surprising, for two reasons. First, as a general matter, the sentence and paragraph structure of a statutory amendment is not a Rosetta Stone of statutory construction from which, alone, we can draw definitive conclusions regarding congressional intent. Second, and more specifically, it is clear that the sentence structure of the Hobbs Act Amendments did not express congressional intent with respect to punishment. For example, the Amendments dealt with attempt and substantive offenses in separate paragraphs, even though a defendant cannot be convicted of both attempt and a substantive offense, let alone be punished for both. *See, e.g., United States v. Madonna*, 582 F.2d 704, 705 (2d Cir. 1978); *United States v. Moss*, 562 F.2d 155, 159 (2d Cir. 1977); *United States v. Hunter*, 478 F.2d 1019, 1023 (7th Cir. 1973). It makes little sense in these circumstances to suggest that, by itself, the use of separate paragraphs evinces congressional intent to authorize separate, potentially cumulative punishments.

Appendix A

The statutory backdrop of § 1958 is, if anything, even more compelling than that of § 1951, because § 1958 was enacted after *Callanan*. Like § 1951, § 1958 criminalizes both substantive offenses and conspiracy, without any specific language precluding cumulative punishment of a defendant, such as Bicaksiz, who commits both. Accordingly, we hold that Bicaksiz's separate, cumulative sentences are authorized by the statute.

B. Admissibility of Bicaksiz's Wife's Testimony

Bicaksiz argues also that the District Court erred at trial in refusing to exclude, pursuant to Fed. R. Evid. 403, Bedriye's testimony that Bicaksiz told her "if you touch my businesses I will die." Bicaksiz interprets the statement attributed to him as a death threat against Bedriye, and argues that it should have been excluded because its probative value was substantially outweighed by the danger of unfair prejudice. *See* Fed. R. Evid. 403.

We review the District Court's rulings on the admissibility of evidence for abuse of discretion, and "[w]e will overturn a trial judge's determination under Rule 403 only if we determine that the judge acted arbitrarily or irrationally." *United States v. Tracy*, 12 F.3d 1186, 1195 (2d Cir. 1993) (finding no abuse of discretion with respect to admission of evidence of death threats by defendant).

Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of

undue delay, waste of time, or needless presentation of cumulative evidence." We have held that "[e]vidence of threats of death is subjected to the same Rule 403 balancing test as other relevant evidence, though the stakes may be heightened." *Tracy*, 12 F.3d at 1195 (citation omitted). In the instant case, the District Court did not abuse its discretion by admitting Bedriye's testimony. The Court held that the evidence of the threat was intrinsic to the crimes of conviction because it was

> part of the government's basic theory that the murder of the brother was intended to intimidate the wife. Had the alleged murder plot been successful, then under the government's theory the wife would have been made so fearful for her life based upon the threat to her and her brother and fortified by the murder of her brother that she would have relented from her position in the divorce proceedings.

We agree that Bedriye's testimony at trial was probative of the government's contention that the projected murder of Esen was part of a scheme to intimidate Bedriye into accepting a disadvantageous divorce settlement,[8] and we find no error, much less arbitrariness or irrationality, in the District Court's decision to admit it.

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8. This is true even though, contrary to the government's proffer and to the District Court's understanding of Bedriye's putative testimony containing the quoted statement, in the end Bedriye never testified that Bicaksiz threatened to kill her brother.

Appendix A

C. Bicaksiz's Request for Downward Departure for Ineffective Assistance of Counsel

Bicaksiz next argues that the District Court should have granted him a downward departure at sentencing because of the ineffective assistance of his original trial lawyer, or, at a minimum, that the District Court should have held an evidentiary hearing on the question.

Bicaksiz argues that his counsel at the time he entered a plea of not guilty, Jeffrey Cohn, was ineffective because Cohn told Bicaksiz that, if convicted at trial of both the conspiracy and substantive violation counts of the indictment, his maximum sentence would be ten years (the maximum term of imprisonment for a single violation of 18 U.S.C. § 1958).

According to Bicaksiz, Cohn believed consecutive sentences were not an option because Assistant United States Attorney David Hennessy, when asked at a detention hearing if Bicaksiz could receive consecutive sentences for the conspiracy and the substantive crime, told the magistrate judge, "In my experience, I believe that — not that they would merge, but I believe that it would be concurrent, in all fairness. I believe that that's what the result would be." Prior to sentencing, the government changed its view and argued that Bicaksiz should receive consecutive sentences.

Bicaksiz claims that his attorney's erroneous advice about the maximum sentence prevented him from entering into serious plea discussions with the government. On this basis, Bicaksiz's new counsel, Ronald Kuby, moved at

sentencing for a downward departure due to ineffective assistance of counsel. The District Court declined to give Bicaksiz the requested downward departure, stating that the request was "based upon a single statement made by Mr. Hennessy at the detention hearing." The Court found that Hennessy's statement did not suffice to create a ground for departure, but that "[i]n any event, even if I were to assume that something about that statement constituted a lawful ground for a departure, departure is solely within the Court's discretion, and given the facts of this case, I would and do decline to depart downward." On appeal, Bicaksiz argues that the District Court erroneously failed to consider that his downward departure request was grounded not only in the government's statement that any sentences would be concurrent, but also in defense counsel's alleged advice that the maximum sentence for both offenses would be ten years.

Whatever the merits of Bicaksiz's claim of ineffective assistance of counsel, which we are not required to address at this time, the District Court properly declined to hold a hearing on the matter and properly denied the motion for a departure on that basis. This asserted species of departure has been mentioned in our cases only in glancing dicta, and we have never endorsed it.[9] Squarely presented with the

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9. In *United States v. Gordon*, 156 F.3d 376 (2d Cir. 1998), we noted that the District Court had denied, on unspecified grounds, defendant's request for a downward departure based on ineffective assistance of counsel. It subsequently granted defendant's motion for habeas corpus relief under § 2255 for ineffective assistance after hearing substantially the same arguments made earlier at sentencing. *Id.* at 378. On appeal, we did not address the appropriateness of a

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question for the first time, we now answer it in the simplest and most categorical terms: Ineffective assistance of counsel is not a basis for a downward departure at sentencing. A finding that a convicted defendant has received ineffective assistance of counsel necessarily calls into question the validity of the conviction. By contrast, the imposition of a sentence (with or without a downward departure) and the entry of judgment necessarily assumes the validity of the conviction. A downward departure on ineffective assistance grounds is impermissible because it simultaneously assumes the validity of a defendant's conviction and conspicuously calls its validity into doubt. Accordingly, we hold that the District Court did not err in denying Bicaksiz a downward departure for ineffective assistance of counsel, or in denying a request for a hearing on the question. Our decision on this score is without prejudice to the possible raising of the ineffective-assistance contention in a separate § 2255 motion.

D. Sufficiency of the Evidence Underlying Krutikov's Conviction

Krutikov argues on appeal that there was insufficient evidence at trial to support his conviction of conspiracy.

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downward departure based on ineffective assistance of counsel except to say in a footnote that "[i]t is quite odd that this request for downward departure was made pursuant to U.S.S.G. § 5K1.1," which covers " 'Substantial Assistance to Authorities'. . . . In hindsight, we think that [defendant's] request should have been made pursuant to U.S.S.G. § 5K2.0, which covers grounds for departure 'not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.' " *Id.* at 377 n.1.

Specifically, he claims that there was no evidence of an agreement between him and any other conspirator.

Krutikov bears a "very heavy burden" in challenging the sufficiency of the evidence that led to his conviction. *See United States v. Keats*, 937 F.2d 58, 62 (2d Cir. 1991). In considering any such challenge, we view all proof in the light most favorable to the government and draw all reasonable inferences in the government's favor. *Id.* We must uphold a conviction if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original).

An essential element of the crime of conspiracy is an agreement. *See, e.g., Iannelli v. United States*, 420 U.S. 770, 777 (1975). We have taken a "bilateral approach" to the crime of conspiracy. *See United States v. Yu-Leung*, 51 F.3d 1116, 1122 n.3 (2d Cir. 1995); *United States v. Gaviria*, 740 F.2d 174, 184-85 (2d Cir. 1984). In other words, "[u]nless at least two people [agree], no one does. When one of two persons merely pretends to agree, the other party, whatever he may believe, is in fact not conspiring with anyone." *United States v. Rosenblatt*, 554 F.2d 36, 38 (2d Cir. 1977) (citations omitted).

There is substantial evidence in the instant case that Krutikov intended to be involved in the murder-for-hire plot. He knew the plot existed, he told Vayzer that he would carry out the murder in exchange for money, he knew of the existence and intermediary role of Sadoulaev, and he drove Vayzer to Paterson to meet with Sadoulaev and collect the

advance payment. Krutikov correctly argues, however, that he could not reasonably have been found to have conspired with Vayzer. While it is clear that Krutikov's agreement with Vayzer to travel to Paterson was a step toward committing the murder for hire, that agreement was not an agreement with a co-conspirator, because the government does not claim that Vayzer was a conspirator at any time. Indeed, the government's arguments on appeal all assume that Vayzer was *not* a conspirator. Moreover, in a statement underscoring the government's theory of its case, the District Court explicitly instructed the jury that "the government has not charged that David Vayzer is a conspirator. However, one conspirator can conspire with other conspirators, even though their identities are unknown to him and he can do so through an intermediary who is not himself a conspirator."

Because the government effectively conceded that Vayzer was not a conspirator at any time, and the District Court instructed the jury accordingly, we agree that Krutikov could not properly have been found guilty of conspiracy for agreeing with Vayzer alone. *See Rosenblatt*, 554 F.2d at 38. Nevertheless, Krutikov reasonably could have been found guilty of conspiracy on the theory that he agreed with the actual conspirators "through" Vayzer. A "person can be convicted of conspiring with persons whose names are unknown." *Rogers v. United States*, 340 U.S. 367, 375 (1951); *United States v. Cepeda*, 768 F.2d 1515, 1516 (2d Cir. 1985) (conspirators "can agree without being aware of one another's identity"). Moreover, parties can conspire through a non-conspiring intermediary, even a government informant. *United States v. Medina*, 32 F.3d 40, 44-45 (2d Cir. 1994). However, while it is true that parties may agree

— *i.e.*, may conspire with each other — without being aware of one another's identity, the evidence must support an inference that, at a minimum, the accused conspirators knew there were other participants in the conspiracy. *See id.* at 45 ("A defendant can conspire with individuals he has never met, so long as he participates *and is aware of their assistance in the criminal venture.*" (emphasis added)); *Cepeda*, 768 F.2d at 1517 ("[T]he evidence must support the existence of such unknown persons and their complicity.").

In *United States v. Sanchez-Solis*, 882 F.2d 693 (2d Cir. 1989), for example, a federal agent arranged with an individual, Luis Gonzalez, to buy a kilogram of cocaine. Gonzalez stated that the cocaine would be delivered in a blue car. A short time later, appellant Sanchez arrived in a blue car and delivered a package of cocaine to Gonzalez. Sanchez appealed his conviction, claiming that there was no evidence that he knew Gonzalez or knew that the package contained cocaine. We held that "the government was not required to prove that Gonzalez and Sanchez conspired directly with each other." *Id.* at 696. Rather, it was enough that Sanchez knew *someone* would be waiting at a specified location to receive the package, even if he did not know the identity of the person. By delivering the cocaine, Sanchez implicitly acknowledged that he was aware of the participation of others in the scheme, even if he knew nothing of their identity.

Krutikov argues that there is no evidence in this case that the original conspirators — Bicaksiz, Kapaev and Sadoulaev — knew that someone other than Vayzer was willing to join the conspiracy. Vayzer communicated only

with Sadoulaev, and he (Vayzer) never told Sadoulaev that he had recruited another person to kill Esen. Nor did Vayzer ever hint to Sadoulaev, his intermediary, that there might be another person involved. On the contrary, Vayzer made clear to Sadoulaev that he did not wish to involve anyone else. In addition, Sadoulaev never indicated, implicitly or explicitly, any willingness to have others participate in the conspiracy. Because there is no evidence in this record to suggest that Sadoulaev knew or acknowledged the existence of anyone other than Vayzer as the potential hitman, Krutikov argues, the requisite agreement between Krutikov and other conspirators is absent.

We disagree. We need not decide whether a Krutikov-Sadoulaev conspiracy is precluded by the latter's affirmative belief that Vayzer, and none other, would act as the hitman. Even if that were the case, it would be possible for Krutikov to have conspired with Bicaksiz[10] — who knew that *someone* was to be hired as a hitman but who knew nothing of the hitman's identity, and therefore, unlike Sadoulaev, had no reason to believe that the hitman would be Vayzer (or any other particular person). Thus, as in *Sanchez-Solis*, there is evidence in this case to support the inference that each of two individuals — here, Krutikov and Bicaksiz — was aware of the other's existence and participation in the scheme, even if they were not aware of each other's identity. At one end of the conspiracy was Bicaksiz, who knew that, at his behest, Sadoulaev would

10. For ease of reference we speak of Bicaksiz only, but we note that Kapaev and Bicaksiz were similarly situated in these and other respects.

arrange for someone to kill Esen.[11] At the other end was Krutikov, who learned through Vayzer that an unnamed person or persons had offered to pay for the murder of Esen. In short, although Bicaksiz and Krutikov were unaware of each other's identity, there is sufficient evidence in the record for the jury to have reasonably found that each was aware of an unknown participant playing an assigned and understood role in furtherance of the criminal venture. Sadoulaev may have believed that Vayzer would carry out the killing himself, but his understanding does not alter the fact that both Bicaksiz and Krutikov were willing to participate — and *did* participate — in a scheme that each knew included other, unidentified persons who would take predictable steps in furtherance of the same illicit goal.

Because we find that the evidence supports the conclusion that both Bicaksiz and Krutikov knew of "the existence of . . . unknown persons and their complicity" in the conspiracy, *Cepeda*, 768 F.2d at 1517, we conclude that the government presented sufficient evidence of the agreement to establish the crime of conspiracy.

III.

To summarize:

(1) We hold that the federal statute that proscribes murder for hire, 18 U.S.C. § 1958, permits separate and

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11. There is no evidence in the record that Bicaksiz knew that Vayzer was the person Sadoulaev had recruited to kill Esen. On the contrary, the record shows that Bicaksiz did not want to know the identity of the hitman.

cumulative punishment of Bicaksiz for both *conspiracy* to travel in interstate commerce with the intent to commit murder for hire and for *the substantive offense* of traveling in interstate commerce with the intent to commit murder for hire.

(2) We conclude that the District Court did not err in admitting into evidence the testimony of Bicaksiz's wife regarding statements by Bicaksiz that could be interpreted as a death threat against her.

(3) With respect to the sentence imposed on Bicaksiz, we conclude that there is no such thing as a downward departure for ineffective assistance of counsel and, therefore, that the District Court did not err in denying Bicaksiz's motion for such a departure or in declining the request by Bicaksiz's newly retained lawyer to hold a hearing on that question.

(4) We conclude that the evidence was sufficient to support the conviction for conspiracy under 18 U.S.C. § 1958 of Krutikov, a sub-contractor of the original hitman (the latter of whom became a government informant and is not regarded by the government or the District Court as a co-conspirator), even though the persons soliciting the murder for hire (Bicaksiz and Kapaev) were not aware of the hitman's identity, and Krutikov, in turn, did not know the identity of those who initiated the murder scheme (Bicaksiz and Kapaev).

Accordingly, we affirm in all respects the judgments entered by the District Court with respect to Bicaksiz and Krutikov.

APPENDIX B — EXCERPT FROM TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED OCTOBER 2, 1998

[commencing at page 41]

* * *

THE COURT: Counsel, let me just go through the basics here.

Each count, Count One and Count Two, carries a maximum penalty of ten years. As I indicated earlier, the counts do not merge and consecutive sentences on these two counts are authorized both by 18 U.S. Code Section 3584(a) and by the applicable guideline 5G1.2D, and the counts are grouped under the quidelines under 3D — I believe it's one point two.

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